Before the
Federal Communications Commission
Washington, DC 20554

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98

JOINT REPLY COMMENTS OF
CBEYOND COMMUNICATIONS, LLC;
ITC^DELTACOM COMMUNICATIONS, INC.
KMC TELECOM HOLDINGS, INC.;
NEWSOUTH COMMUNICATIONS CORP.,
NUVOX, INC. AND
XO COMMUNICATIONS, INC.

Cbeyond Communications, LLC ("Cbeyond"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), KMC Telecom Holdings, Inc. ("KMC Telecom"), NewSouth Communications Corp. ("NewSouth"), NuVox, Inc. ("NuVox") and XO Communications, Inc. ("XO")(collectively, "Joint Commenters"), by their attorneys, hereby submit these Joint Reply Comments in support of the May 17, 2002 Petition for Declaratory Ruling of NuVox, Inc. ("Petition") and in response to comments filed in this proceeding on July 3, 2002 by SBC Communications, Inc. ("SBC"), United States Telecom Association ("USTA"), and Sprint Corporation ("Sprint").[1] The Joint Commenters assert herein that the "opposition" comments submitted by SBC, USTA, and Sprint have no merit as they do little more than misrepresent statements made and the relief sought by NuVox in the Petition and distort the parameters of the limited audit right granted to ILECs in the *Supplemental Order Clarification*[2].

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1 Public Notice, CC Docket No. 96-98, DA 02-1302 (June 3, 2002, corrected June 4, 2002).

2 *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000) ("*Supplemental Order Clarification*").

I. THE OPPOSITIONS FILED DEMONSTRATE THAT THE DECLARATORY RULINGS SOUGHT BY NUVOX ARE INDEED NECESSARY

The Opposition Comments filed by BellSouth, SBC, USTA and Sprint in this proceeding, as well as the Comments in support filed by WorldCom, CompTel, Cbeyond, ITC^DeltaCom, KMC Telecom, NewSouth and XO, demonstrate that there is indeed substantial debate and dispute over the parameters of the limited audit rights the FCC granted to ILECs in association with special access to EEL conversions required as a result of Rule 315(b). The Joint Commenters here, including NuVox, along with WorldCom and CompTel see things one way, while two ILECs join BellSouth and USTA in seeing things another way. One group says the FCC's *Supplemental Order Clarification* should be interpreted in one way and supports declarations to confirm the reasonable interpretations presented and curtail abuses, while the other suggests a different interpretation and urges action (or inaction) that would permit the abuses to continue. Thus, it seems appropriate that this dispute is before the Commission, as it will now have a chance to rule on the requirements of its own order and quell widespread industry dispute.

Notably, the declaratory rulings sought by NuVox and supported by the rest of the Joint Commenters, as well as WorldCom and CompTel, are not requests for rulemakings, as the Sprint asserts. This assertion, made by Sprint,[3] is simply based on the myopic view that a request for the FCC to issue an order containing declarations on the meanings of its own order *that contrast with and thereby curb* the ILECs' misinterpretation and misapplication of the order somehow constitutes a change in law requiring a rulemaking. This is nonsense (especially in light of the fact that the order that is the subject of dispute, as well as the order it sought to *clarify*, actually modified an order that resulted from notice and comment rulemaking with no

[3] Sprint Comments at 8 (suggesting that NuVox has requested "drastic changes" in audit procedures).

subsequent public notice and comment of their own). FCC action curbing or preventing ILEC abuses based on intentional misinterpretation of FCC rules and orders simply does not amount to a change in law requiring a new notice and comment rulemaking.[4]

USTA's assertion that the action requested on the Petition should come in response to a Section 208 complaint is no more persuasive. While BellSouth and Sprint certainly could find themselves the subject of multiple Section 208 complaints in this regard, the Petition addresses a broad, industry-wide problem that is well suited to resolution in the context presented: a request for generally applicable declaratory rulings. Moreover, the Commission should not allow USTA and its members to shield themselves and their abuses of Commission rules and policies with the resource-intensive, expensive and time consuming Section 208 complaint process. CLECs can ill-afford to litigate every dispute regarding ILEC abuses – both the Commission and the ILECs know this to be the case. The Commission ought not tolerate this systematic means deployed by the ILECs to deliver to CLECs a death of a thousand cuts.

II. THE ORDER REQUIRES STATEMENT OF A "CONCERN" – RANDOM AUDITS ARE NOT PERMITTED

SBC's claim that it cannot establish a "concern" because CLECs have all the evidence regarding compliance is baseless.[5] The Commission stated that ILECs must have a concern.[6] It must be presumed that the Commission meant what it said and that it did not intend to adopt a requirement with which it is impossible to comply.

Notably, SBC contradicts itself on the very next page of its filing with the assertion that "an ILEC will request an audit only when it reasonably and legitimately suspects

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4 Notably, NuVox, Cbeyond, KMC and others have indeed sought a rule change in the appropriate context – the ongoing Triennial Review. The Petition, however, is not about what those new rules should be, but is instead very much focused on what the current rules are.

5 SBC Comments at 5; *see also* Sprint Comments at 5.

6 *Supplemental Order Clarification,* ¶ 31, n.86.

that a CLEC has failed to comply with the local usage requirements."[7] SBC's suspicion does not rise to the level or "reasonable" or "legitimate" in a vacuum. Surely, an ILEC must have some basis for "reasonably and legitimately" suspecting noncompliance. The *Supplemental Order Clarification* requires the ILEC to present it.[8] The Petition asks the Commission to affirm that such is the case and that the ILECs may not keep secret their concern or simply fabricate one.

The Commission's *Net2000 Order*[9], also lays to rest any argument that it is impossible to comply with the Commission's rule.[10] There, Verizon formulated a concern regarding compliance based on information in its possession. Although Verizon used that concern to block conversion rather than audit after the fact, the Commission nevertheless recognized that Verizon had no difficulty coming up with evidence probative of compliance with the safe harbor requirements.

Sprint's assertion that audits can be random demonstrates just how brazen the ILECs can be in ignoring Commission orders and policy.[11] The *Supplemental Order Clarification* plainly states that

> The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that **audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.** *February 28, 2000 Joint Letter* at 3. **We agree that this should be**

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7 SBC Comments at 6.

8 Sprint's contention that the FCC required an ILEC to have a concern but not explain it is a makeweight argument that defies reason and would otherwise serve to gut the rule. Sprint Comments at 4.

9 *Net2000 Communications, Inc. v. Verizon,* File No. EB-00-018, Memorandum Opinion and Order, FCC 01-381 (rel. Jan. 9, 2002).

10 Ironically, SBC cites this order as if it somehow supports their contention that only CLECs have evidence regarding compliance. SBC Comments at 5, n.20.

11 Sprint Comments at 4 ("Some random audits may be warranted to ensure requesting carriers comply with the order.").

the only time that an incumbent LEC should request an audit.[12]

If audits cannot be routine and cannot be conducted but for a concern regarding compliance, it defies reason to suggest that a random audit – or multiple random audits (as BellSouth likely would characterize the 15 or so it has requested in recent months) can be deemed compliant with the *Order*.

III. AN INDEPENDENT AUDIT CANNOT HAVE THE APPEARANCE OF BEING BIASED AND MUST COMPLY WITH AICPA STANDARDS

USTA, SBC and Sprint each stretch their own credibility by mischaracterizing the Petition as being one that seeks a declaration ruling that any individual with ILEC employment experience or entity with ILEC clients cannot be independent.[13] The Petition, by its own terms, does not seek to bar individuals with any ILEC employment experience from serving as auditor. Instead, the Petition seeks a ruling regarding ILEC consulting shops – particularly those whose principals have had substantial parts of their careers in the employ ILECs, whether directly or by servicing their needs as clients.[14] Such individuals simply cannot be deemed "independent", as the potential for bias is high, even if unintended. Moreover, the consulting enterprise used as the example in the Petition – the consulting shop selected by both BellSouth and Sprint[15] – in its proposal to BellSouth concerning these audits touts its success in using audits to recover millions

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12 *Supplemental Order Clarification*, ¶ 31, n.86 (emphasis added).

13 USTA Comments at 3 ("were the FCC to declare that auditors with prior ILEC employment experience are disqualified . . ."); SBC Comments at 7 ("the mere fact that an auditor has worked for an ILEC does not mean its impartiality has been compromised"); Sprint Comments at 5 ("There is no basis for invalidating an audit simply because audit personnel have experience working in the ILEC industry").

14 Petition, at 6-7.

15 It is surprising that Sprint fails to disclose that it, too, has hired ACA to conduct at least one EEL audit. Sprint Comments at 6. Notably, one of the Joint Commenters, XO, is the target of the Sprint audit referenced by Sprint. Sprint Comments at 5, n.7. XO submits that it has no obligation to comply with Sprint's unauthorized audit request. *See id.*

of dollars for its ILEC clients. Such statements are among several reasons why ACA could not be fairly considered independent.

The Commission previously has invoked standards adopted by the American Institute of Certified Public Accountants ("AICPA") to ascertain auditor independence.[16] The AICPA standards require auditors to "avoid situations that may impair the appearance of independence". *Id.* (citing AICPA Standards § 100.26). Accordingly, the Commission should bar the use of an ILEC consulting enterprise as an "independent auditor". Based on the information set forth in the Petition and in NuVox's Reply, ACA simply could comply with AICPA standards which require the avoidance of situations that simply impair the appearance of independence.[17]

IV. THE SAME COST-BASED CONVERSION CHARGE SHOULD APPLY TO ANY RECONVERSION DEEMED NECESSARY

Although SBC appears to be hedging with respect to the costs it both seeks to impose on CLECs for special access to EELs conversions and may attempt to impose for any reconversions at some point in the future as a result of an audit finding noncompliance, it is notable that even SBC does not support BellSouth's proposed assessment of special access NRCs on reconversions.[18] Indeed, SBC appears to support the Petition's request for a declaration ruling stating that the same cost-based conversion charges shall apply to any reconversions.[19] Sprint hedges even more, stating that "the carrier should be charged

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16 *In re Application of Ameritech Corp. and SBC Communications, Inc for Consent to Transfer Control,* CC Docket No. 98-141, Memorandum Opinion and Order (rel. Oct. 9, 1999), ¶ 504, n.923.

17 Notably, SBC suggests that Ernst & Young is an independent auditor. SBC Comments at 7, n.23. Based on its national reputation, none of the Joint Commenters have any reason to challenge that general proposition.

18 SBC Comments at 9, n.27.

19 *See id.*

appropriately".[20] The fact that these two carriers have taken these positions and could not come out to offer public support for BellSouth's proposed special access surcharges demonstrate that they, too, believe that BellSouth's proposal is unreasonable, if not unlawful.

III. CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the NuVox Petition, NuVox's June 26, 2002 Reply and the July 3, 2002 Joint Comments filed by Cbeyond, ITC^DeltaCom, KMC Telecom, NewSouth and XO, the Commission should grant the Petition and issue the declaratory rulings requested therein.

Respectfully submitted,

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[20] Sprint Comments at 6.